Supreme Court, U.S.
FILED
95-604 OCT 12 1995
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No. _____

In The

Supreme Court of the United States

October Term, 1995

LONG COVE CLUB ASSOCIATES, L.P.,

Petitioner,

vs.

THE TOWN OF HILTON HEAD ISLAND,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the governmental taking of a vested development permit that allowed a use contrary to that allowed under later rezoning require just compensation under the Fifth Amendment?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Long Cove Club Associates, L.P. and the Respondent, The Town of Hilton Head Island. There were no briefs filed *amicus curiae*.

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OPINIONS BELOW

The opinion and judgment of the South Carolina Supreme Court dated June 12, 1995 is reported at ___ S.C. ___, 458 S.E.2d 757 (1995), and is reprinted in the Appendix hereto, at App. 1-1, *infra*.

The South Carolina Supreme Court's denial of Petitioner's Petition for Rehearing dated July 14, 1995 has not yet been reported, and is reprinted in the Appendix hereto, at App. 2-1, *infra*.

The opinion and judgment of the Circuit Court of Beaufort County, Special Circuit Court Judge Kemmerlin presiding, of September 22, 1993 was not reported, and is reprinted in the Appendix, at App. 3-1, *infra*.

The opinion and judgment of the Circuit Court of Beaufort County, on Petitioner's Motion to Reconsider, Special Circuit Court Judge Kemmerlin presiding, of March 29, 1994 was not reported, and is reprinted in the Appendix, at App. 4-1, *infra*.

JURISDICTION

Petitioner seeks review of the opinion and judgment of the South Carolina Supreme Court of June 12, 1995. Petitioner's subsequent Petition for Rehearing was denied on July 14, 1995. The Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

U.S. CONST. amend V.

The text of this provision is reprinted in the Appendix hereto, beginning at App. 5-1, *infra*.[1]

STATEMENT OF THE CASE

On May 5, 1980, the Beaufort County Joint Planning Commission approved and adopted Petitioner Long Cove's Master Plan for a Planned Unit Development (PUD) identified as the Long Cove Club Associates and Commercial Subdivision. A plat of the Long Cove Commercial Subdivision was certified on that date, by the Joint Planning Commission, as part of its preliminary approval pursuant to the Beaufort County Development Standards Ordinance, then in effect. The PUD allowed unrestricted commercial use along Highway 278; this use was granted with the approval of a PUD under M-1 zoning (Planned Development Mixed Use).

The Town of Hilton Head was incorporated in 1983, and Petitioner's Master Plan was subsequently approved by the Town of Hilton Head Planning Commission on October 19, 1983, pursuant to the Hilton Head Island Development Standards Ordinance (DSO). Plat maps of the Long Cove PUD were recorded in the Beaufort

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[1] Also printed is Hilton Head Island, S.C., Town Code § 16-7-711, *et seq.* (1983) since it clearly establishes the vested use right, and § 16-7-400, *et seq.* (1987) which reflects the rezoned classification.

County RMC office on May 13, 1983, May 21, 1984, and February 5, 1986.

On April 11, 1984, the Town of Hilton Head Island issued Final Development Permit #0880 to Petitioner, which gave Petitioner the right to develop a commercial subdivision along Highway 278 as set forth in the approved PUD. Petitioner then made significant cost expenditures on development of infrastructure for future phases of the commercial subdivision.

The Comprehensive Plan for the Town of Hilton Head, adopted on December 16, 1985, identified Long Cove Club as an approved Master Planned Neighborhood. On January 20, 1987, the Town of Hilton Head Island adopted a zoning ordinance (Hilton Head Land Management Ordinance) which, among other things, rezoned the area along Highway 278 from M-1 (Planned Development Mixed Use) to C-3 (Office/Institutional Low Density). Within this area as the subject property with its vested and permitted commercial use.

Petitioner immediately requested that Respondent confirm that the C-3 classification would not apply to the Long Cove Commercial Subdivision and that the permit remained valid. Petitioner was advised that usages of land other than C-3 could only be allowed through rezoning, and that variances as to use were not allowed under the Land Management Ordinance.

On March 17, 1987, Petitioner applied for rezoning, without waiving any vested rights or remedies. Hilton Head Town Council finally denied Petitioner's rezoning application on July 6, 1987, and Petitioner commenced this lawsuit on September 24, 1987 alleging *inter alia* a

constitutional taking of a vested granted permit. In the lawsuit the Respondent took the position that the permit was no longer valid.

On Respondent's Motion for Summary Judgment, the Circuit Court of Beaufort County, Special Circuit Court Judge Kemmerlin presiding, held that Petitioner could not make a showing that Respondent's zoning activity deprived the underlying land with the permit of all economically viable uses, therefore there was no constitutional taking of the Final Development Permit. The South Carolina Supreme Court affirmed, holding on June 12, 1995, that since the Petitioner's ability to develop the underlying property was only decreased to the extent allowed under the rezoned classification there could be no taking.[2]

On July 14, 1995, the South Carolina Supreme Court rejected Long Cove's Petition for Rehearing.

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[2] Looking to the remaining value of the land to which a permit attaches to determine if a permit has any remaining value is clear error and violates the mandates of the Fifth Amendment to the United States Constitution. A vested permit is a separate and distinct property right with its own indirect value which is measured by a before and after value approach to the subject lands; by no measure does the fact that the land has value without the permit allow a taking of the permit without paying just compensation.

STAGE AT WHICH FEDERAL QUESTION WAS RAISED

The question of Fifth Amendment taking without just compensation was first raised below in Petitioner's Complaint dated January 17, 1988. The Circuit Court granted summary judgment in favor of Respondent, concluding that there had been no taking.

The constitutional takings issue was presented and argued before the South Carolina Supreme Court, which ruled that there was no taking of the permit. The question was again presented to the South Carolina Supreme Court in Petition for Rehearing, which was denied.

REASONS FOR GRANTING THE WRIT

In this Petition, the Court is invited to consider the governmental taking of a vested Final Development Permit brought about by governmental rezoning of *inter alia* the subject land and thereafter precluding the development that had been authorized by the vested permit. "Where a previously valid permit has been issued and construction begun, a subsequent rezoning that effectively revokes permission to build is a confiscatory taking of the permit itself." *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983) citing, *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982). In affirming the trial court's grant of summary judgment in favor of Respondent, Town of Hilton Head Island, the South Carolina Supreme Court concluded that the development permit retained some value because the subject land had residual value which would preclude

any effort by Long Cove to prove that there had been a taking of the permit. This conclusion reflects the State Supreme Court's lack of appreciation for the nature of rights in a governmental granted use permit and confuses land usage under zoning laws with land usage pursuant to a vested development permit. The opinion utterly ignores the fact that through the permit, Long Cove Club had acquired a vested right to commercially develop its 9.87 acres of land defined by the M-1 (Planned Development/Mixed Use) classification for its commercial subdivision. By combining and confusing development permit rights with land use rights under zoning, the court concluded that a taking had not occurred, reasoning that, because the underlying land could be developed under the new zoning classification there was no taking of the permit.

The question which is presented for this Court's consideration is whether or not just compensation shall be paid to one whose vested development permit has been taken and replaced by a new rezoning activity, which precludes uses which had been authorized in the vested permit. No permit is needed to develop the land in conformance with the new zoning.

It is clear that the Fifth Amendment's protection against taking without just compensation applies to personal property (*Andrus v. Allard*, 441 U.S. 51 (1979)) including intangible personal property (*Ruckelshaus v. Monsanto Company*, 467 U.S. 986 (1984)). According to state law, rights in a permit are property rights and are entitled to the protections accorded to other property rights. *See, Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983).

Long Cove Club held a property right in the Final Development permit, which was also a vested right. The vesting of a property right provides the property owner with protection or assurances against deprivations of the property. *See, Pure Oil Division v. City of Columbia,* 254 S.C. 28, 173 S.E.2d 140 (1970) ("When a zoning or building permit has been properly issued and the owner has incurred expenses in reliance thereon, he acquires a vested property right therein of which he cannot be deprived without cause or in the absence of public necessity"); *Pendleton v. City of Columbia,* 209 S.C. 394, 40 S.E.2d 499 (1946) (when work upon a building is commenced and liabilities are incurred pursuant to a building permit, the owner acquires a vested property right which is entitled to protection); and *Willis v. Town of Woodruff,* 200 S.C. 266, 20 S.E.2d 699 (1942) (building permit holder who has contracted and incurred liabilities pursuant to permit acquires property right of which he is entitled to protection).

Long Cove's permit rights vested by compliance with Hilton Head, S.C., Town Code § 16-7-744 (1983):

> Any Final Development Permit approved under the provisions of this chapter shall become invalid two years from the date of its issue unless:
>
> * * *
>
> (2) The subdivision plat or PUD Master Plan has been recorded, or
>
> (3) An appreciable amount of improvement or development of the land has commenced in accordance with the approved permit, which in

> the case of phases developments shall be understood as improvement or development of the permitted phase of such development.[3]

By virtue of the recordation of subdivision plats on May 13, 1983, May 21, 1984, and February 5, 1986, and Petitioner's commitment of resources to infrastructure development, Long Cove has satisfied the above criteria for continued viability of the Final Development Permit, so that Long Cove's rights under the permit had vested.

The term "vested rights" refers to interests which it is proper for the state to recognize and protect and of which the individual could not be deprived arbitrarily without injustice. *Campbell v. Holt,* 115 U.S. 620 (1885).

Although the state may change or take away rights which were created by the law of the state, it may not take away property which has vested by virtue of such rights. *Re: McGlone's Will,* 284 N.Y.527 (1940), 32 N.E.2d 539 (1940), (aff'd 314 U.S. 556 (1942)).

This Court long ago recognized that the failure to exercise a vested right before the enactment of a subsequent statute which seeks to divest it does not affect or lessen the right. *Steamship Co. v. Joliffe,* 69 U.S. 450 (1864).

Through the vesting of Development Permit #0880, Long Cove Club acquired the right to develop its commercial subdivision along Highway 278. The vesting of rights under Development Permit #0880 meant that those rights were permanently fixed and insulated against the effects of subsequent zoning changes. The Development

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[3] The specified time period was changed to "one calendar year" by amendment in 1985.

Standards Ordinance (DSO), then in effect, provided municipal recognition of this right: "A change in this chapter which becomes effective after a final development permit has been granted shall not apply to the permitted development unless such permit shall have expired." Hilton Head Island, S.C., Town Code § 16-7-742(b) (1983).

When municipal rezoning activity has the effect, as in this case, of disallowing a use of land reflected in a vested development permit, then there has been a confiscatory taking of the permit requiring just compensation, even though economically beneficial uses for the subject land remained. Because the essence and sole value in a vested development permit lies in its ability to withstand changes in zoning laws and land use regulations, any governmental modification of the use authorized by the permit totally destroys the value of the permit. It does not matter that the land to which a permit relates may continue to have many uses under the rezoned classification; such residual value would suggest only that the rezoning did not effect a taking of the land. When, however, rezoning has the effect of changing the type of use which would be authorized on land for which a vested development permit has been issued, the permit is not merely diminished in value, it is rendered totally and absolutely worthless.

In the case at bar, the South Carolina Supreme Court simply considered the rights afforded by the development permit to be the same as or co-extensive with land use rights under zoning law. This is evident from the conclusion that the permit retains some value in the ability to use the land for uses authorized under the new

zoning classification. No development permit is needed to take advantage of an existing zoning classification. If the reasoning of the South Carolina Supreme Court is correct, then a vested development permit affords no rights other than those which exist in the land under the zoning laws and there would be no reason to ever seek a development permit.

Under the state supreme court's reasoning, one must query what rights, if any, are reflected or embodied in a development permit if the land is equally as vulnerable to subsequent land use regulation with the permit as without the permit. According to *Scott v. Greenville County*, at 1421, a building permit is a distinct species of property which, when subjected to subsequent rezoning, is functionally revoked. The Fourth Circuit considered such action to be a confiscatory taking.

This Court has frequently addressed the question of a governmental taking of land by diminution or elimination of uses wrought by rezoning or other land use regulation. *See Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Agins v. City of Tiburon*, 447 U.S. 257 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Unquestionably, the power to regulate land use through zoning and rezoning pursuant to the police power is necessary to a local government's discharge of its duties to the public. The right to use and enjoy land must be subject to this governmental ability to regulate, and no one could seriously contend that a landowner has an unfettered right to use his land without condition or limitation imposed by the

government. The exercise of this zoning power has resulted in considerable litigation challenging the government's power to regulate, diminish, and eliminate uses of land. In attempting to find the point at which the regulation of non-vested rights becomes a taking requiring just compensation, this Court has recognized that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In *Lucas v. South Carolina Coastal Council*, ___ U.S. ___ (1992), this Court held that "[w]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, . . . he has suffered a taking." *Lucas*, at 2895 (emphasis in original). If the *Lucas* reasoning is applied here there is a taking since the vested development permit by admission and by definition no longer has any intrinsic value.

The South Carolina Supreme Court misapplied this reasoning of *Lucas* to the circumstances in *Long Cove* when it allowed remaining value in the land (real property) to defeat Long Cove's claim that the vested permit itself was taken. Because Permit #0880 afforded Long Cove the right to all the commercial uses of the M-1 zoning classification, notwithstanding different uses which may subsequently be prescribed by rezoning, it would be unconstitutional to allow a local government, through rezoning, to take away the M-1 use vested in Long Cove by virtue of the development permit. The ability of a development permit to survive rezoning, intact, is crucial to the economic structure upon which land development is founded, and upon which financial commitment depends. It is vitally important that the Fifth

Amendment's power to protect against taking of permit rights without just compensation be re-established, and that it not be eroded by the misapplication of zoning jurisprudence to destroy vested permit rights.

CONCLUSION

Respondent's failure to recognize Development Permit #0880 after rezoning was clearly a revocation of the permit. By being subjected to those land uses specified in the rezoned classification, Long Cove had no rights other than those afforded by the zoning law. The vested permit use was taken. The permit had no use, meaning, or value. The South Carolina Supreme Court's decision results from its confusing land rights under zoning cases with the obligation of the government to honor those vested rights which it grants through issuance and vesting of a development permit. Long Cove's permit was taken by Respondent in violation of the Fifth Amendment to the United States Constitution.

Respectfully submitted,

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Attorneys for Petitioner

Columbia, South Carolina
October 11, 1995

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Long Cove Club Associates, L.P., a South Carolina Limited Partnership, Appellant,

v.

The Town of Hilton Head Island, South Carolina; Town Council of the Town of Hilton Head Island, South Carolina; Michael J. Malanick; Bruce C. Black; Henry C. Driessen, Jr.; Suzane M. James; Donald S. Hook; William M. Marsher; and W. Bruce Fairchild, individually and in their capacity as members of the Town Council, Respondents.

Appeal From Beaufort County
Thomas Kemmerlin, Jr., Special Circuit Judge

Opinion No. 24255
Heard March 9, 1995 – Filed June 12, 1995

AFFIRMED

A. Camden Lewis and Thomas A. Pendarvis, both of Lewis, Babcock & Hawkins, of Columbia, for appellant.

Curtis L. Coltrane, of Wilson & Coltrane, of Hilton Head Island, for respondents.

MOORE, A.J.: Appellant (Long Cove) commenced this action seeking $700,000 in damages for an alleged unconstitutional taking of its property as a result of respondents' (Town's) enactment of a rezoning ordinance. The trial judge granted Town's motion for summary judgment. We affirm.

FACTS

The real property in issue is a 9.872 acre parcel within the Long Cove Club Commercial Subdivision. Town gave preliminary approval of Long Cove's master plan, which included the Commercial Subdivision, on October 19, 1983. On April 11, 1984, a "Development Permit" was issued for the Commercial Subdivision certifying that it "has met and is in accordance with the Development Standard[s] Ordinance of Beaufort County."

Subsequently, on January 19, 1987, Town enacted the Land Management Ordinance which replaced the Development Standards Ordinance as the ordinance governing land use within Town's limits. Under the new ordinance, the 9.872 acre parcel was rezoned from M-1 to C-3, a more restricted commercial use zone.

Shortly thereafter, Long Cove sold the 9.872 acre parcel to Hargray Telephone Company for $1.3 million along with an assignment of the Development Permit. Long Cove then commenced this action alleging an unconstitutional taking, not of the 9.872 acre parcel, but of the Development Permit itself. The trial judge found no taking as a matter of law.

ISSUE

Was summary judgment properly granted on the issue of an unconstitutional taking?

DISCUSSION

Under the rule espoused in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), a land use regulation does not effect a taking if it (1) substantially advances legitimate government interests and (2) does not deny an owner all economically viable use of his land. *See also Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, ___ L.Ed.2d ___ (1994). Long Cove raised no challenge to the first prong of this test. Applying the second prong, the trial judge found no taking because Town's rezoning did not deprive Long Cove of all economically beneficial use of the 9.872 acre parcel or the Development Permit.

Long Cove concedes it has no taking claim under Lucas as to the 9.872 acre parcel since it was not deprived of all economically beneficial use of the land. Long Cove argues, however, the Development Permit was its personal property that was taken by Town's enactment of the rezoning ordinance. *See Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983). It contends the Lucas analysis does not apply to this taking claim.

Long Cove does not cite, nor has our research uncovered, any authority for the proposition that the *Lucas* analysis does not apply to an alleged regulatory taking of personal, as opposed to real, property. To the contrary, in *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979), a case involving an alleged regulatory taking of

personal property,[1] the United States Supreme Court relied on regulatory taking cases that involved real property[2] and concluded there was no taking of the personal property in question since the property retained some value. In this case, the Development Permit retained some value since it permitted an owner's development of the property to the extent allowed under the rezoned classification of C-3. Accordingly, we hold summary judgment was properly granted.

We need not address Long Cove's arguments regarding the alternative ground of the trial judge's ruling. Long Cove's remaining arguments are without merit and are disposed of pursuant to Rule 220(b), SCACR.

AFFIRMED.

FINNEY, C.J., TOAL, WALLER, JJ., and Acting Associate Justice A. Lee Chandler, concur.

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[1] The property owner in *Andrus* alleged a taking of eagle feathers resulting from a regulatory enactment that prohibited commerce in the parts of protected birds.

[2] *Penn Central Transportation Co. v. New York City*, 488 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922); *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 278, 81 L.Ed. 205 (1887).

(SEAL)

THE SUPREME COURT OF SOUTH CAROLINA

CLYDE N. DAVIS, JR.
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
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July 14, 1995

A. Camden Lewis, Esquire
Thomas A. Pendarvis, Esquire
P.O. Box 11208
Columbia, SC 29211

Re: Long Cove Club Associates, L.P. v. The Town of Hilton Head

Gentlemen:

The Court has refused your Petition for Rehearing in the above case in the following Order:

"Petition for Rehearing is denied.

s/ Ernest A. Finney, Jr. C.J.
s/ Jean H. Toal A.J.
s/ James E. Moore A.J.
s/ John H. Waller, Jr. A.J.
s/ A. Lee Chandler A.A.J.

July 14, 1995 "

The remittitur in this matter is today being forwarded to the Clerk of Court for Beaufort County.

Very truly yours,

/s/ Illegible
CLERK

CND,Jr./jlb

cc: Curtis L. Coltrane, Esquire

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	CIVIL ACTION NO.: 91 CP-07-1756

LONG COVE CLUB ASSOCIATES, L.P. a South Carolina Limited Partnership, consisting of LONG COVE CLUB INVESTORS, INC.; DAVID W. AMES; JOSEPH A. WEBSTER, III; WESTON C. WILHELM; AMES FAMILY TRUST I; WILHELM FAMILY TRUST I; MARTHELM, INC.; WEBCO, INC,; and AMESCO, INC.,

Plaintiff,

vs.

THE TOWN OF HILTON HEAD ISLAND, SOUTH CAROLINA; THE TOWN COUNCIL OF THE TOWN OF HILTON HEAD ISLAND, SOUTH CAROLINA; MICHAEL J. MALANICK; BRUCE C. BLACK; HENRY C. DRIESSEN, JR.; SUZANNE M. JAMES; DONALD S. HOOK; WILLIAM M. MARSCHER AND W. BRUCE FAIRCHILD individually and in their capacity as members of the Town Council of the Town of Hilton Head Island, South Carolina,

Defendants.

ORDER

This matter is before the Court upon cross motions for Summary Judgement filed pursuant to Rule 56, S. C. R. C. P. by the Plaintiffs and Defendant herein.[1] In addition, the Defendant also filed a Motion to Dismiss under Rule 12 (b) (1); and a Motion to Amend Answer to Requests for Admissions under Rule 36 S. C. R. C. P. The Plaintiffs also filed a motion to require the undersigned to recuse himself from further consideration in these proceedings. The Motions came to be heard before the undersigned on May 20, 1993. Present were A. Camden Lewis and Thomas A. Pendarvis, in their capacity as counsel to the Plaintiffs, and Curtis L. Coltrane, in his capacity as counsel to the Defendant. Each party submitted extensive briefs on the facts and law. At the conclusion of the hearing, the matter was taken under advisement.

PROCEDURAL BACKGROUND

This action was commenced by the filing of a Summons and Complaint dated September 9, 1987. The original Complaint set forth four (4) separate causes of action, all arising from alleged impropriety on the part of the Defendants in the disposition of an application for a rezoning of certain property owned by the Plaintiffs within the Town of Hilton Head Island, South Carolina.

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[1] At this time, the only Defendant remaining in the action is the Town of Hilton Head Island, South Carolina. As will be outlined, *infra.*, the claims against the individual Defendants were dismissed by an Order of the Undersigned dated July 6, 1988.

Thereafter, on October 22, 1987, The Defendants served Motions under Rule 12 (b)(6) S. C. R. C. P., seeking to dismiss all of the Plaintiffs' causes of action. Thereafter, on November 2, 1987, and prior to a ruling on the various motions filed by the Defendants; the Plaintiffs filed and served an Amended Complaint. The Amended Complaint set forth five (5) causes of action, to wit: 1) A claim that the Plaintiffs had been deprived of their civil rights under 42 U. S. C. § 1983; 2) A claim for "unconstituitonal taking of a permit"; 3) A claim asserting a "South Carolina Constitutional Tort"; 4) A claim asserting that Defendants' actions were negligent; and, 5) A declaratory judgment action seeking to have a "final development permit" declared valid.

Thereafter on March 30, 1988 the Defendants filed and served various Motions to Dismiss the five (5) causes of action as to the individual Defendants and the Town of Hilton Head Island, South Carolina. These Motions were heard by the undersigned, and on July 6, 1988 an Order was filed which dismissed all causes of action as to the individual Defendants, and which dismissed all causes of action, except the second cause of action which was the claim for an "unconstituitonal taking of a permit" as to the Town of Hilton Head Island, South Carolina. No appeal was filed from the July 6, 1988 Order.[2]

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[2] The Plaintiffs also filed a companion case to the instant action in August of 1987. The companion case bore Beaufort County Civil Action Number 87-CP-07-1439. Case Number 87-CP-07-1439 was based upon the same facts as the instant case and set forth claims as follows: 1) a "Taking" of the Plaintiffs' property through a failure to re-zone; 2) A claim that the Plaintiffs were entitled to a re-zoning of their property, or alternatively, that the Defendant's zoning ordinance was

Thereafter, the Parties engaged in a series of discovery requests and filed numerous motions relating thereto. In addition, the Defendant filed a Motion for Summary Judgment. The Motion for Summary Judgment was head before the Hon. William L. Howard. Judge Howard Issued an order denying the Defendants Motion for Summary Judgment on February 22, 1989.[3]

Thereafter, on March 13, 1989, the Hon. Luke N. Brown, Jr., executed and filed an Order striking this case from the trial roster pursuant to Rule 40 (c)(3), S. C. R. C. P.

Thereafter, on February 27, 1991, the Plaintiffs filed a Motion seeking to restore the case to the active trial roster. The Motion to restore came to be heard on July, 11, 1991. By an Order dated August 15, 1991 the case was

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unconstitutional; 3) a claim seeking a writ of mandamus, requiring the Defendants to re-zone the Plaintiffs' property; and, 4) a appeal from the denial of the re-zoning request. This Complaint was dismissed in its entirety on July 6, 1988. The Plaintiffs initiated an appeal from the Order dismissing the Complaint, but later abandoned the same.

[3] The Plaintiffs argue that despite the addition to the record of the depositions of David W. Ames and Weston C. Wilhelm and the affidavits of William E. Issel, Bruce C. Black, John L. Present and John P. Qualey, Jr., to the record, that the Defendant is somehow precluded from seeking summary judgment due the denial of the Defendant's earlier motion. No authority is cited for this position. In addition, Judge Howard's order does not purport to be a final order (as, indeed, orders denying motions for summary judgment are interlocutory and not final) and simply states that "further development of the facts in this case is necessary for a determination". (*See:* Order of William L. Howard dated February 22, 1989, p. 2) This argument of the Plaintiffs is without merit.

restored and was placed on the non-jury roster. Thereafter, on July 30, 1992 the undersigned executed a scheduling order setting forth the time limits for the conclusion of discovery and trial, which Order was subsequently amended by consent of the Parties on November 30, 1992.

PENDING MOTIONS

The following motions were filed by the Parties hereto, and were heard by the undersigned on May 20, 1993:

1. The Defendant's Motion for Summary Judgment, dated October 5, 1992.
2. The Plaintiffs' Motion for Summary Judgment as to Defendant's Liability, dated November 2, 1992.
3. The Defendant's Motion to Amend Answer to Requests for Admissions, dated February 21, 1983.
4. The Defendant's second Motion for Summary Judgment, dated February 26, 1993.
5. The Defendant's Motion to Dismiss pursuant to Rule 12 (b)(1), dated February 26, 1993.
6. The Plaintiff's Motion to have the Judge Recuse Himself, dated March 1, 1993.[4]

The various motions were supported, in addition to items already of record, by the affidavits of David W. Ames, William E. Issel, John L. Present, John P. Qualey,

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[4] This motion had previously been filed by the Plaintiff on July 24, 1992. The Plaintiff thereafter withdrew this motion.

Jr., Bruce C. Black and James M. Herring; as well as the deposition testimony of Weston C. Wilhelm and David W. Ames.[5]

FACTS

There is little dispute as to the material facts in this matter. Based upon the evidence presented by the parties, I find the following to be the material facts of this case.

1. Prior to May 5, 1980, the Plaintiffs herein acquired title to "Long Cove Club", which is a mixed-use subdivision or "planned unit development" located on Hilton Head Island, Beaufort County, South Carolina. (*See:* Amended Complaint, paragraph 11; Ames Affidavit, p. 1)

2. At the time of the Plaintiffs' acquisition of "Long Cove Club", (i. e., prior to May 5, 1980) the Town of Hilton Head Island, South Carolina, had not yet been incorporated, and permitting of land uses and approval of subdivision plats were carried out by the Beaufort County Joint Planning Commission.

3. On May 5, 1980, the Beaufort County Joint Planning Commission granted a "preliminary approval" for "Long Cove Commercial Subdivision". (*See:* Ames Affidavit, p. 1) "Long Cove Commercial Subdivision" consists of approximately forty-one (41) acres, and was a part of the

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[5] The Plaintiffs' Memorandum in support of its Motion for Partial Summary Judgment included an unsigned affidavit prepared for Weston C. Wilhelm as an exhibit. At his deposition, however, Mr. Wilhelm stated that he had not signed the affidavit. (*See:* Wilhelm Deposition, p. 64, l. 21 to p. 66, l. 2)

overall "Long Cove Club". (*See:* Amended Complaint, p. paragraph 11; Wilhelm Deposition, p. 14, 1. 3-12)

4. Separate approvals were obtained for the residential portion "Long Cove Club" and the "Long Cove Commercial Subdivision" in order to make certain that the area containing the commercial uses were clearly delineated from the residential areas of "Long Cove Club". (*See:* Ames Deposition, p. 13, 1. 13 to p. 14, 1. 5) The issues in this case involve only a portion of "Long Cove Commercial Subdivision" and not the residential portion of "Long Cove Club".

5. The Town of Hilton Head Island, South Carolina, was incorporated on or about May 18, 1983. Thereafter, permitting of land uses and approval of subdivision plats within the territorial limits of the Town of Hilton Head Island, South Carolina, were carried out by the Planning Commission of the Town of Hilton Head Island, South Carolina.

6. Thereafter, on October 19, 1983, the Planning Commission of the Town of Hilton Head Island, South Carolina, granted a preliminary approval to the "Long Cove Club" masterplan, which included the "Long Cove Club Commercial Subdivision". (*See:* Ames Affidavit, p. 1-2)

7. On April 11, 1984, the Planning Commission of the Town of Hilton Head Island, South Carolina, granted a final development approval the "Long Cove Club Commercial Subdivision". (*See:* Ames Affidavit, p. 2)

8. The Plaintiffs herein did not undertake the actual final development, construction and establishment of

uses within the "Long Cove Club Commercial Subdivision". Rather, specific parcels within the "Long Cove Club Commercial Subdivision" were sold to third parties who developed the parcels within "Long Cove Club Commercial Subdivision" to suit the particular third party's needs. The Plaintiffs maintained certain control over the parcels by virtue of covenants which encumbered the "Long Cove Club Commercial Subdivision". (*See:* Wilhelm Deposition, p. 16, 1. 4-15)[6]

9. As of January 19,1987, the only portion of "Long Cove Club Commercial Subdivision" which remained the property of the Plaintiffs was a 9.782 acre parcel, and this 9.782 acre parcel is subject of the instant case. (*See:* Ames Deposition. p. 33, 1. 19 to p. 34, 1. 6)

10. Prior to January 19, 1987, land use within the territorial limits of the Town of Hilton Head Island, South Carolina, was governed by the "Development Standards Ordinance" of the Town of Hilton Head Island, South Carolina, which was codified as § 16-7-10, *et seq., Code of the Town of Hilton Head Island* (1983). The Development Standards Ordinance was adopted on October 3, 1983, and remained in effect (with various amendments) until January 18, 1987. (*See:* Issel Affidavit, p. 1)

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[6] The Plaintiffs did undertake some "site work" within the subject parcel, or which could be utilized by development within the subject parcel. Water and Sewer lines which were installed to service other development were installed so that the subject parcel could also be served by the same limes [sic]. No laterals have been installed, however, (*See:* Wilhelm Deposition, p. 21, 1. 22 to p. 30, 1. 4) In addition, a small roadway was built on the subject property and acquired and installed a curb cut. (*See:* Wilhelm Deposition, p. 17, 1. 3-10)

11. At the time that the Plaintiffs received Final Development Permit 0880 (April 11, 1984), the "Development Standards Ordinance [§ 16-7-10, *et seq., Code of the Town of Hilton Head Island* (1983)] provided as follows, with respect to the life of final development permits:

Section 16-7-744. Expiration of final development permit.

> Any final development permit approved under the provisions of this chapter shall become invalid two years from the date of its issue unless:
>
> (1) A building permit is issued and construction is commenced within the life of the building permit, or
>
> (2) The subdivision plat or PUD masterplan has been recorded, or
>
> (3) An appreciable amount of improvement or development of the land has commenced in accordance with the approved permit, which in the case of phases developments (sic) shall be understood as improvement or development of the permitted phase of such development.[7] (*See:* Issel Affidavit, p. 2)

12. The "Development Standards Ordinance" [§ 16-7-10, *et seq., Code of the Town of Hilton Head Island* (1983)] provided a procedure whereby a landowner could obtain an administrative determination as to whether or not

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[7] Section 16-7-744, *Code of the Town of Hilton Head Island, South Carolina* (1983) was subsequently amended to provide for expiration one year from the date of issue.

"vested rights" existed under any previously issued Preliminary or Final Development Permit. The Development Standards Ordinance of the Town of Hilton Head Island, South Carolina [§ 16-7-10, *et seq., Code of the Town of Hilton Head Island, South Carolina* (1983)] provided, in relevant part:

> Section 16-7-1011. Purpose.
>
> Notwithstanding any other provision of this chapter, and application for final development approval and/or issuance of a final building permit may be approved if the applicant has demonstrated the existence of a vested right to proceed, under the standards set forth in this article. (*See:* Issel Affidavit, p. 3)

13. The standards for demonstrating a vested right to proceed were set forth in the Development Standards Ordinance of the Town of Hilton Head Island, South Carolina [§ 16-7-10, *et seq., Code of the Town of Hilton Head Island, South Carolina* (1983)] were as follows:

> Section 16-7-1012. Standards for Vested Rights.
>
> (1) The existence of a governmental act which formally authorized the particular course of plan of development sought to be furthered by the variance.
>
> (2) That the applicant acted in "good faith", without knowledge that an impending or pending change in land use regulations might affect his development expectation;
>
> (3) That the applicant made substantial investments or incurred extensive obligations which are real, actual and considerable in

amount in pursuing the previously authorized development concept, thereby detrimentally relying on the governmental act aforementioned; and,

(4) That the vested rights acquired are so substantial that it would be fundamentally unfair to apply this chapter, in its unvaried entirety to the proposed development concept, without cause or in the absence of any intervening considerations of public necessity of such action. (*See:* Issel Affidavit, p. 3)

14. On January 19, 1987 the "Land Management Ordinance" of the Town of Hilton Head Island, South Carolina was adopted and codified as § 16-7-10, *et seq., Code of the Town of Hilton Head Island* (1983). Upon its adoption, the "Land Management Ordinance" of the Town of Hilton Head Island, South Carolina replaced the "Development Standards Ordinance" as the ordinance governing land use within the territorial limits of the Town of Hilton Head Island, South Carolina. (*See:* Issel Affidavit, p. 1)

13. [sic] In connection with the adoption of the "Land Management Ordinance" [§ 16-7-10, *et seq., Code of the Town of Hilton Head Island* (1983)], the Town of Hilton Head Island, South Carolina, also adopted an "Official Zoning Map". [*See:* Affidavit of Bruce C. Black, p. 1; Affidavit of John L. Present, p. 1; *See also:* § 16-7-402, *Code of the Town of Hilton Head Island, South Carolina* (1983)]

14. [sic] Under the Official Zoning Map adopted as part of the "Land Management Ordinance" [§ 16-7-10, *et seq., Code of the Town of Hilton Head Island* (1983)], the 9.872 acre parcel, was within the "C-3" Zone of the Town of

Hilton Head Island. The "C-3" Zone was designated as an "Office/Institutional Low Intensity Zoning District". [*See:* § 16-7-452, *Code of the Town of Hilton Head Island, South Carolina* (1983)]

15. With regard to pre-existing preliminary or final development approvals, the "Land Management Ordinance" [§ 16-7-10, *et seq., Code of the Town of Hilton Head Island* (1983)], provided as follows:

> 16-7-350. Findings of Fact and Statement of Intent:
>
> Town Council further finds that, pursuant to the terms of the ordinance in effect prior to the adoption of this chapter, that certain development approvals were granted, namely, "preliminary approvals" and "final development permits". In adopting this part B of Article III, it is not the intent of Town Council to deny any individual a reasonable opportunity to proceed with development plans based on such prior approvals.
>
> 16-7-356. Status of Prior Final Development Permit.
>
> Any Final Development Permit granted prior to the effective date of this chapter shall become invalid upon its expiration.
>
> 16-7-360. Appeal to Board of Adjustment.
>
> Any person aggrieved by a determination made pursuant to the provisions of this article shall have the right to appeal to the Board of Adjustment consistent with the procedures and requirements set forth in Article VI of this chapter.

16. Prior to the adoption of the "Land Management Ordinance" [§ 16-7-10, *et seq., Code of the Town of Hilton Head Island* (1983)], the Plaintiffs became aware that the 9.782 acre parcel would be within the "C-3" zone under the new ordinance and the Official zoning map. (*See:* Ames Deposition, p. 21, 1. 20-24; Ames Affidavit, p. 2; Wilhelm Deposition, p. 41, 1. 2-8)

17. Although the Plaintiffs believed that the "C-3" zoning classification was inconsistent with "vested" development rights under the Plaintiffs final development permit, the Plaintiffs did not seek relief under the existing procedures for obtaining an administrative determination as to the status of any claimed "vested" rights under the existing law, to wit: the "Development Standards Ordinance" of the Town of Hilton Head Island, South Carolina [§ 16-7-10, *et seq., Code of the Town of Hilton Head Island, South Carolina* (1983)] (*See:* Ames Deposition, p. 21, 1. 25 to p. 23, 1.13; p. 25, 1. 13-18; Wilhelm Deposition, p. 44, 1. 6-15)

18. Subsequent to the enactment of the "Land Management Ordinance" [§ 16-7-10, *et seq., Code of the Town of Hilton Head Island* (1983)], the Plaintiffs did not seek relief under the provisions providing for administrative relief relative to the status of any claimed "vested" rights under the final development permit with respect to the 9.782 acre parcel. (*See:* Ames Deposition, p. 26, 1. 4 to p. 28. 1. 9; Wilhelm Deposition, p. 44, 1. 17 to p. 77, 1. 20; Issel Affidavit, p. 5)

19. Subsequent to the enactment of the "Land Management Ordinance" [§ 16-7-10, *et seq., Code of the Town of Hilton Head Island* (1983)] the Plaintiffs sought to obtain a

rezoning of the 9.782 acre parcel from a "C-3" zone to a "M-1" zone.[8]

19. The Plaintiffs sought the rezoning with a full reservation of their rights to pursue their claim of vested rights under the final development permit. (*See:* Amended Complaint, paragraph 35; page 1 of "Narrative In Support of Zoning Map Amendment" attached as Exhibit 2 to Qualey Affidavit)

20. The Plaintiffs application for rezoning was heard by the Town Council of the Town of Hilton Head Island, on July 6, 1987. The Town Council for the Town of Hilton Head Island, South Carolina, voted to deny the request. (*See:* Amended Complaint, paragraph 37; Amended Answer, paragraph 26)

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[8] The Ames Affidavit, at page 3, states that Mr. Ames was advised that the only avenue available for relief from the "C-3" zoning was to file an application for a rezoning. This is the only evidence upon which the Plaintiffs rely to establish their claim that any effort to seek a determination of the status of the plaintiffs claimed vested rights under the final development permit with respect to the 9.782 acre parcel would have been futile. The interpretation that the Plaintiffs now urge on this portion of the Ames Affidavit is not supported by but rather is contradicted by, all of the other evidence, including the transcript of the Plaintiffs' attorney's own statements before the Town's administrative bodies at the time the rezoning application was presented, and the application for rezoning itself. (*See:* Qualey Affidavit, p. 2 and exhibit 1, p. 5) The Plaintiffs expressly reserved their rights to pursue the issue of vested rights. In addition, Mr. Ames' testimony on the subject given in 1992 does not support the interpretation of the Ames Affidavit which the Plaintiffs now argue. (*See:* Ames Deposition, p. 26, l. 24 to p. 27, l. 8)

21. Subsequent to the denial of the Plaintiffs' application for rezoning, the Plaintiffs did not pursue any administrative relief provided by the "Land Management Ordinance" [§ 16-7-10, *et seq., Code of the Town of Hilton Head Island* (1983)] relative to the claimed vested rights under the final development permit. (*See:* Issel Affidavit, p. 5; Ames Affidavit, p. 27, 1. 9 to p. 28, 1. 9)

22. At no relevant time did the Plaintiffs ever file an application for a building permit with respect to the 9.782 acre parcel. Indeed, it was never the intent of the Plaintiffs to do so. (*See:* Wilhlem [sic] Deposition, p. 36, 1. 3-14)

23. On or about September 9, 1987 the Plaintiffs commenced the instant action. (*See:* Amended Complaint)

24. On November 2, 1987, the Plaintiffs sold the 9.782 acre parcel and assigned all its rights under the final development permit relating thereto to Hargray Telephone Company, Inc., for the sum of One Million Three Hundred Thousand and no/100 ($1,300,000.00) Dollars. (*See:* Ames Deposition, p. 34, 1. 17 to p. 35, 1. 2; exhibit 4 to Ames Deposition; Wilhelm Deposition, p. 60, 1. 19 to 21)

ISSUES

The issues framed by the three separate Motions for Summary Judgment are as follows:

1. Assuming, *arguendo,* that the actions of the Defendant as alleged by the Plaintiffs had some impact on some property of the Plaintiffs, and further assuming, *arguendo,* that the Plaintiffs' claim is ripe for adjudication, does a claim for "taking of the Plaintiffs' property without just

compensation" exist where the only impact that can be shown is some diminution in the value of the Plaintiffs' property?[9]

2. Is the Plaintiffs' claim for the alleged "taking of the Plaintiffs' property without just compensation" ripe?

Each of these issues will be discussed in sequence below.

ISSUE 1: HAS THERE BEEN A TAKING?

The Plaintiffs in this case assert that their property was taken by the Defendant without just compensation in contravention of the Fifth Amendment to the United States Constitution and S. C. Const., Art. 1, § 13. (*See:* Plaintiffs' Memorandum dated November 10, 1992) Under the analysis required when the Plaintiff has asserted a "taking of property without just compensation" under the Fifth Amendment to the United States Constitution and S. C. Const., Art. 1, § 13, the Court must make two determinations: 1) Does the regulation at issue substantially advance a legitimate governmental interest? and, 2) As a result of the application of the regulation to the property in question, has the owner been deprived of all or substantially all economic use of the property? *Nollan v. California Coastal Commission*, 483 U.S. 825, 107

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[9] There is a sub-issue present here. The Plaintiffs argue that the "final development permit" and not the real property was the property "taken". While this position is not one that is sound under the existing law as cited by the Plaintiffs, it does not appear that the analysis would change, even if the "final development permit" is a species of property that can be "taken".

S.Ct. 3141, 92 L.Ed.2d 677 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980)[10]

1. Does the regulation at issue substantially advance a legitimate state interest?

Since the Plaintiffs' assert a "taking without just compensation" claim, they have, of necessity, admitted that the regulation advances a legitimate state interest. *Reahard v. Lee County, supra.*, 968 F.2d at p. 1136; *Ruckelshaus v. Monsanto Co.*, 323 U.S. 373, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). The Plaintiffs make no argument that the enactment of the "Land Management Ordinance" and the Official Zoning Map [§ 16-7-10, *et seq.*, *Code of the Town of Hilton Head Island* (1983)] did not advance a legitimate government interest.

2. As a result of the application of the regulation to the property in question, has the owner been deprived of all or substantially all economic use of the property?

As was stated in note, 8 *supra.*, the Plaintiffs assert that the Final Development Permit number 0880 was the "property" that was taken. This argument is based upon a line of cases wherein "due process" takings claims were

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[10] The recent United Stated [sic] Supreme Court case of *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 111 S.Ct. 1073, 112 L.Ed.2d 179 (1991) did not change or modify the existing law with regard to the analysis required for "denial of just compensation" takings claims. *See: McAndrews v. New Bank of New England*, 796 F. Supp. 613 (D.Mass 1992); *Bernardsville Quarry v. Bernardsville Borough*, 608 A.2d 1377 (N.J. 1992)

asserted as a result of affirmative government acts which were designed to thwart specific plans being carried out by a land owner. *See: A.A. Profiles, Inc. v. City of Ft. Lauderdale, et al.*, 850 F.2d 1483 (11th Cir. 1988); *Corn v. City of Lauderdale Lakes*, 771 F.Supp. 1557 (S.D.Fla. 1991); *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99, *cert. denied*, 456 U.S. 973, 102 S.Ct. 2236, 72 L.Ed.2d 847 (1982)[11]

The cases relied upon by the Plaintiff are distinguishable from the instant case because of the following critical point: Each of the plaintiffs in *A.A. Profiles, Inc. v. City of Ft. Lauderdale, supra.; Corn v. City of Lauderdale Lakes, supra.; Scott v. Greenville County, supra.;* and *Wheeler v. City of Pleasant Grove, supra.*, had obtained, or was entitled to, a permit for a specific use on its property and the permit was either denied or affirmatively revoked by unlawful intervention of the government directed solely at the rights of the Plaintiff.[12]

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[11] The reliance by the Plaintiffs on the "due process" takings cases is mis-placed for another reason. There is a critical distinction between the proof required to sustain a "due process" takings claim as opposed to a "taking without just compensation" claim. A "due process" takings claim, unlike a "just compensation" claim, does not require denial of *all* reasonable use of the property; it is sufficient to show that the government has arbitrarily interfered with the landowner's right to a particular use. *Corn v. City of Lauderdale Lakes, supra.* In the case at bar, the Plaintiffs assert a "just compensation" claim, and therefore must show that *all* economically viable uses have been foreclosed.

[12] The various courts made the following specific findings: *A.A. Profiles, Inc. v. City of Ft. Lauderdale, supra.:* The City Commissions' action was a confiscatory measure. *id.* at p. 1488; *Corn*

In the instant case, there is no evidence of any affirmative governmental act directed at the Plaintiffs which denied the Plaintiffs any specific right to which they were otherwise entitled.

Indeed, the Plaintiffs made no application for a building permit or sought to establish any other specific use which was turned down by the Defendant. In addition, the Plaintiffs never sought any administrative determination as to their claim of vested rights under the final development permit, even though they expressly reserved the right to do so in the filing of their application for a re-zoning.

The only actions undertaken by the Defendant which are alleged to have "taken" the Plaintiffs' property are the adoption of the "Land Management Ordinance" and the Official Zoning Map [§ 16-7-10, *et seq., Code of the Town of Hilton Head Island* (1983)] and the denial of the Plaintiffs' rezoning request.[13] The actions do not amount to the

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v. City of Lauderdale Lakes, supra.;: [the City Council's] actions were, instead, motivated by a desire to thwart CORN's proposed project. *id.*, at p. 1560; *Scott v. Greenville County, supra.*: The record unequivocally establishes that Scott was deprived of his building permit by the extraordinary and unlawful intervention of the County's highest governing body into the process. *id.*, at page 1419; and Wheeler v. City of Pleasant Grove, supra.,: This Court perceives the enactment of Ordinance no. 216 to be a bald attempt to revoke an already authorized building permit. *id.*, at p. 100.

[13] I note, however, that the Plaintiffs asserted the same claim, i.e., that the refusal to grant the requested rezoning constituted a "taking of the Plaintiffs' property without just compensation" in Beaufort County Civil Action Number 87-CP-07-1439. This claim was dismissed by an Order dated July 6,

affirmative, illegal act designed to interfere with the Plaintiffs' rights as was expressly found to exist in *A.A. Profiles, Inc. v. City of Ft. Lauderdale, supra.; Corn v. City of Lauderdale Lakes, supra.; Scott v. Greenville County, supra.;* and *Wheeler v. City of Pleasant Grove, supra.* Theses [sic] cases, therefore, have no application to the case at bar.

Under the existing law governing "taking without just compensation claims" (as opposed to the "due process takings cases relied on by the Plaintiffs) the Plaintiffs must demonstrate that they have been deprived of all or substantially all economic use of their property. *Nollan v. California Coastal Commission, supra.; Agins v. City of Tiburon, supra.*

As was stated above, the Plaintiffs assert that the property which was taken was Final Development Permit Number 0880. Assuming, *arguendo,* that the final development permit can be segregated from the real property, as urged by the Plaintiffs, the Plaintiffs must still show that all or substantially all of the interest represented by the permit has been wholly taken.

The final development permit represented a collection of uses to which the Plaintiffs' real property could be put. Therefore, in order to show that the permit has been "taken without just compensation" the Plaintiffs must show that all, or substantially all of the uses available under the final development permit are no longer available under the "C-3" zoning classification.[14]

1988. Although an appeal was filed from this Order, it was later abandoned.

[14] The Plaintiffs must also meet the threshold issue of showing that there has, in fact, been some impact on the rights

The Plaintiffs admit that even under the "C-3" zoning classification, that many viable commercial uses exist for the 9.782 acre parcel. They further admit that the real property maintained substantial value, and that the real property, along with the development rights were sold for the sum of One Million Three Hundred Thousand and no/100 ($1,300,000.00) Dollars.[15]

The Plaintiffs describe the injury for which they seek compensation as: 1) "a diminution in the value of their real property due to the rezoning"; 2) "loss in property value due to the inability to build certain structures"; and that they "lost certain uses for their property, the actual concrete injury". (*See:* Plaintiffs' responses to Defendant's Interrogatories dated June 29, 1992 and Plaintiffs' Motion for Summary Judgment dated December 23, 1988)

In the context of Fifth Amendment Takings jurisprudence, no rule is more firmly settled than "a mere diminution in value does not constitute a taking". *Brabham v. City of Sumter,* 275 S.C. 597, 274 S.E.2d 297 (S.C. 1981); *Williamson County Regional Planning Commission v. Hamilton Bank,* 437 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 847 (1982); *Penn Central Transportation Company v. New York City,* 438 U. S. 104 (1978); *Agins v. Tiburon, supra.*

The Plaintiffs attempt to evade application of this rule to their claim by asserting that particular uses that were permitted under Final Development Permit 0880 but

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represented by the final development permit. See the discussion on ripeness, *infra.*

[15] *See:* Wilhelm Deposition, p. 60, l. 7-21.

which are not permitted under the "C-3" zoning classification can be segregated from the entire bundle of the Plaintiffs' rights and be found to have been totally taken.

This approach of separating one strand in the bundle of rights described as "property" has been expressly rejected, however. In the case of *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993) the United States Supreme Court faced an argument similar to that of the Plaintiffs' herein and in overruling the same, stated as follows:

> We reject Concrete Pipe's contention that the appropriate analytical framework is the one employed in our cases dealing with the permanent physical occupation or destruction of economically beneficial use of real property. See Lucas v. South Carolina Coastal Council, 505 U.S. ___, ___, 112 S.Ct. 2886, 2890-2892, 120 L.Ed.2d 798 (1992) While Concrete Pipe tries to shoehorn its claim into this analysis by asserting that "[t]he property of [Concrete Pipe] which is taken, is taken in its entirety," Brief for Petitioner, 37, we rejected this analysis years ago in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 130-131, 98 S.Ct. 2646, 2662, 57 L.Ed.2d 631 (1978) where we held that a claimant's parcel could not first be divided into what was taken and what was not taken for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; that relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.

See also: Bernardsville Quarry v. Bernardsville Borough, supra.; McAndrews v. New Bank of New England, supra.; Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987)

The "property" in this case (whether it be viewed as the development rights under the permit or the real estate to which the rights attach) must be viewed as a whole. The loss of some of the rights through the application of a regulation, or the diminution in value of the property, while other and substantial economically viable rights remain, or while the property maintains substantial value, simply cannot, under the existing law, constitute a taking.

Motions for Summary Judgment are filed pursuant to Rule 56 S. C. R. C. P. Under Rule 56, *supra.*, the moving party is entitled to summary judgment if the "pleadings, affidavits, depositions, answers to interrogatories and admissions on file, . . . , show that there is no genuine issue as to any material fact. . . . " Rule 56(c) S. C. R. C. P.; *SSI Medical Services, Inc. v. Cox,* 301 SC 493, 392 SE2d 789 (1990); *Baughman, et al. v. AT & T Nassau Metals Corporation,* 298 SC 127, 378 SE2d 599 (1990)

Rule 56(c), *supra.*, has recently been interpreted as follows:

> The plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish an element essential to the party's case, and on which the party will bear the burden of proof at trial.

Baughman, et al. v. AT & T Nassau Metals Corporation, supra.

In this case, the Plaintiff simply cannot make a showing that the adoption of § 16-7-100, *et seq., Code of the Town of Hilton Head Island (1983)* deprived them of all or substantially all economically viable uses of 1) the real estate to which the Final Development Permit 0880 applied; or, 2) the development rights under the final development permit. Under the law as set forth in Rule 56(c) S. C. R. C. P.; *SSI Medical Services, Inc. v. Cox, supra.;* and *Baughman, et al. v. AT & T Massau Metals Corporation, supra.,* the Defendant is entitled to summary judgment as to the Plaintiffs' of a taking without just compensation.

ISSUE 2: IS THE PLAINTIFFS' CLAIM RIPE?

The Defendant also asserts that the Plaintiffs' claim is not ripe because the Plaintiffs' have never sought a building permit or pursued the administrative remedies afforded under § 16-7-100, *et seq., Code of the Town of Hilton Head Island* (1983). The United States Supreme Court has repeatedly held that a final government decision as to the permitted uses of land is a condition precedent to institution of a claim for taking of property without just compensation. The United States Supreme Court has observed:

> Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations which purport to limit it.

MacDonald, Sommer and Frates v. County of Yolo, 477 U.S. 340, 351, 106 S.Ct. 2561, 2567, 91 L.Ed. 285 (1986); *See also: Williamson County Regional Planing [sic] Commission v. Hamilton Bank, supra.*

The Plaintiffs admit that they never sought a building permit or to obtain any administrative determination of the status of their claimed vested rights under the final development permit.[16]

The Plaintiffs allege that they were relieved of the necessity of exhausting their administrative remedies because such an action would have been futile. The record, however, is clear that, apart from the rezoning application, the Defendant was never asked to make an administrative determination or otherwise pass upon the status of the Plaintiffs' final development permit.[17]

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[16] *See:* Wilhelm Deposition, p. 42, l. 9-22; p. 44, l. 6-15; p. 45, l. 22 to p. 46, l. 6; p. 47, l. 8-20; and Ames Deposition, p. 22, l. 15-25; p. 23, l. 1-9; p. 26,l. 4-12; p. 26, l. 24 to p. 27, l. 8.

[17] The Plaintiffs rely on the affidavit of David W. Amos to show that a material fact exists as to the futility of any effort to exhaust administrative remedies. I have previously found that the interpretation of Mr. Ames' affidavit that the Plaintiffs' urge on the court is inconsistent with all of the evidence. *See* note 7, *supra*. In addition, the Plaintiffs' rely on an answer to a request for admission filed in July of 1988, one and one half years after the operative events herein, and many months after the Plaintiffs sold the property. The answer to the request for admission states only that the Plaintiffs' final development permit expired by operation of law two years after its issue, in accordance with the existing ordinances. The Plaintiffs' urge that this is an admission that the Defendants "took" the Plaintiffs' final development permit. This assertion ignores the fact that in order to establish a "taking", an affirmative governmental act is

The only evidence present is that there has never been a final determination by the Defendant as to what uses would have been available (or not available) under the Plaintiffs' final development permit. Likewise, there is no evidence of any positive or affirmative act by the Defendant which showed a non-recognition of any rights claimed by the Plaintiffs. Without such evidence, the Plaintiffs' claim must fail. *MacDonald Sommer and Frates v. County of Yolo, supra., Williamson County Regional Planing [sic] Commission v. Hamilton Bank, supra.* See also: *Gasque v. Town of Conway, supra.; Hill v. Hanahan, supra.; South Carolina State Highway Department v. Moody, supra.*

Once again, there is an essential element missing in the Plaintiffs' case, that being the final determination by the Defendant that its claimed rights under the final development permit would not be recognized by the Defendant. Under the law as set forth in Rule 56(c) S. C. R. C. P.; *SSI Medical Services, Inc. v. Cox, supra.;* and *Baughman,* et al. *v. AT & T Nassau Metals Corporation, supra.,* the Defendant is entitled to summary judgment as to the Plaintiffs' claim of a taking without just compensation.

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required. See: *MacDonald Sommer and Frates v. County of Yolo, supra., Williamson County Regional Planing [sic] Commission v. Hamilton Bank, supra.; Gasque v. Town of Conway, 194 SC 15, 8 SE2d 871 (1940); Hill v. Hanahan, 287 SC 521, 316 SE2d 681 (S.C. App. 1944); South Carolina State Highway Department v. Moody, 267 SC 130, 226 SE2d 423 (1976)* The response to the request for admission simply cannot be read as an admission of any affirmative act of the Defendant which was directed at and which actually affected any rights of the Plaintiffs.

MOTION FOR RECUSAL

The Plaintiffs' "Motion to have Judge Recuse Himself" also came to be heard before the undersigned on May 20, 1993. The "Motion to have Judge Recuse Himself" had previously been filed by the Plaintiffs on or about July 24, 1991 and was withdrawn at the time it was called for hearing in August of 1991. The basis for recusal set forth in the "Motion to have Judge Recuse Himself" is as follows:

> Plaintiff moves to have Judge Thomas Kemmerlin, Jr. recuse himself from hearing this case on the grounds that pending before the Supreme Court of South Carolina is an unrelated matter argued by counsel for Plaintiff (sic), in which it was argued that Judge Kemmerlin violated his obligations as a judge through *ex parte* contact with opposing counsel in that matter. Upon information and belief, Plaintiff's (sic) rights will be unfairly, improperly, and substantially prejudiced by Judge Kemmerlin hearing this case.

It is not alleged in the Motion that the undersigned has any bias against any or all of the Plaintiffs, or that the undersigned has any pre-disposition relative to this particular case. The Plaintiffs offered no evidence that I would not discharge my duties with respect to their rights in this case simply because of allegations made by their attorney in different matter on behalf of a different client. No connection between the two matters or clients, except for the identity of the attorney, is stated. No evidence that I had made any statements or otherwise demonstrated any bias against Plaintiffs' counsel was offered. The Plaintiffs offered no evidence, by way of affidavit or

otherwise, to substantiate the claim that their rights would be "unfairly, improperly, and substantially prejudiced" by my hearing of this case.

Canon 3(C)(1)(a) of the *Code of Judicial Conduct*, Rule 501 S. C. A. C. R., requires a judge to recuse himself when the judge "has personal bias or prejudice concerning a party . . . " The meaning of this rule has been interpreted as follows:

It is not enough for a party to simply allege bias; a party seeking disqualification of a judge must show some evidence of bias or prejudice. *Lyvers v. Lyvers*, 280 S.C. 361, 312 S.E.2d 590 (Ct.App. 1984); *State v. Loftin*, 278 S.C. 618, 300 S.E.2d 480 (S.C. 1983); *Reading v. Ball*, 291 S.C. 492, 354 S.E.2d 397 (Ct.App. 1987)

Here, no bias against the Plaintiffs themselves is even alleged, and no evidence of any bias against Plaintiffs' counsel was demonstrated.[18]

Given the complete failure of the Plaintiffs to offer any evidence of any bias or prejudice by the undersigned

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[18] The undersigned is aware of the case of *Shaw v. State*, 276 S.C. 190, 277 S.E.2d 140 (S.C. 1981), wherein the Supreme Court held that a trial judge must accept the factual allegations in a motion to disqualify as true. The motion states only that Plaintiffs' counsel argued an alleged *ex parte* contact in an unrelated case. While it is true that Plaintiffs' counsel made such an argument in an unrelated case, this fact, standing alone, does not show that the undersigned has any personal bias or prejudice against the Plaintiffs herein. The factual allegation, accepted as true, is legally insufficient, because it alleges no conduct by the undersigned which demonstrate any bias or prejudice toward the Plaintiffs herein or their attorney. *Shaw v. State, supra.*

toward the Plaintiffs herein, I would therefore deny the Plaintiffs' "Motion to have Judge Recuse Himself".

MOTION TO AMEND ANSWER TO REQUEST FOR ADMISSION

The Defendant also filed a motion to be permitted to amend the response to the request for admission filed on behalf of the Defendant on July 20, 1988. The Plaintiffs contend that the amendment should not be permitted because they would be prejudiced thereby. The prejudice claimed by the Plaintiffs is that they interpret the July 20, 1988 response to the request for admission as a final administrative determination by the Defendant as to the status of their claimed vested rights under the final development permit. As was discussed in note 17, *supra.*, the interpretation of the response to the request for admission urged by the Plaintiffs simply does not hold up. It is, in fact, contradicted by the positions and actions of the parties throughout this litigation, and the Plaintiffs could not have reasonably relied upon it as the basis for their claim, as they now argue. In addition, the Plaintiffs' assertion that a statement to effect that the final development permit expired by operation of law can amount to an admission of a direct governmental act which interfered with the rights of the Plaintiffs is not supported by the law or evidence cited by the Plaintiffs.[19]

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[19] The Plaintiffs argue that the Motion to Amend the Request for Admission was filed on February 26, 1993, near the end of the discovery deadline. The motion was not argued until May 20, 1993 (nearly 90 days later) however, and so the Plaintiffs had ample opportunity to seek an extension of the discovery deadline or to obtain such affidavits as they may have considered appropriate.

Having previously determined that the interpretation of the response to the request for admission argued by the Plaintiffs is not supported by the law or the evidence, it would appear that no prejudice would result to the Plaintiffs by permitting the amendment. Therefore, the amended as requested by the Defendant is permitted pursuant to Rule 36(b) S. C. R. C. P.

DEFENDANT'S MOTION TO DISMISS

The Defendant also filed a motion to dismiss, alleging that the Plaintiffs' lacked standing to bring the instant suit, by virtue of the assignment of all their rights under the final development permit to third party. The Plaintiffs' argue that the assignment document reserved the Plaintiffs' rights to pursue this action. The Defendant argues that since no final determination as to the status of any claimed vested rights under the final development permit has never been submitted for a final determination, that the Defendant is exposed to multiple claims for the same alleged damage. Having reviewed the relevant document, and considered the arguments, I find that the record is not sufficiently developed in order to allow the undersigned to rule on the Motion to Dismiss. I would, therefore, deny the same at this time, without prejudice to the rights of the Defendant to refile the same at some later time (if the need to rule on the same arises), once the record is sufficiently developed.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

For the reasons set forth above relative to the Defendant's Motions for Summary Judgment, I would deny the Plaintiffs' Motion for Partial Summary Judgment.

Therefore, based upon the Findings and conclusions as set forth hereinabove: it is:

ORDERED, ADJUDGED AND DECREED:

1. The Plaintiffs' Motion for Partial Summary Judgment is denied.

2. The Defendant's Motions for Summary Judgment are granted.

3. The Defendant's Motion to Amend the Response to the Request for admission is granted.

4. The Defendant's Motion to Dismiss is denied, without prejudice to the right of Defendant to pursue the same at some later time.

IT IS SO ORDERED.

/s/ Thomas Kemmerlin, Jr.
Thomas Kemmerlin, Jr.,
Master In Equity for
Beaufort County

Beaufort, South Carolina

This 22nd Day of September, 1993.

SEEN:

LEWIS, BABCOCK AND HAWKINS

Pursuant to correspondence from J. Kemmerlin dated July 26, 1993, but reserving the right to object to the Order.

By: /s/ Thomas A. Pendarvis
A. Camden Lewis, Esq.
Thomas A. Pendarvis, Esq.
Attorneys for the Plaintiffs

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	) IN THE COURT OF) COMMON PLEAS) CIVIL ACTION NO.:) 91-CP-07-1756	
LONG COVE CLUB ASSOCIATES, L.P. a South Carolina Limited Partnership, consisting of LONG COVE CLUB INVESTORS, INC., DAVID W. AMES, JOSEPH A. WEBSTER, III, WESTON C. WILHELM, AMES FAMILY TRUST I, WILHELM FAMILY TRUST I, MARTHELM, INC., WEBCO, INC. and AMESCO, INC., Plaintiff, vs. THE TOWN OF HILTON HEAD ISLAND THE TOWN OF HILTON HEAD ISLAND TOWN COUNCIL, ET AL., Defendants.	)	**ORDER**

The case returns to me upon the Plaintiff's Motion to Reconsider, pursuant to Rule 59(e) SCRCP, my Order of September 22, 1993. I studied the nineteen-page Memorandum which the Plaintiff filed in Support of the Motion, heard the oral arguments of counsel, listened patiently until the attorneys for both sides said that they had nothing further to say, took the challenged Order

home and read it over the weekend, considered the arguments I had heard, and now in the light of all of that, I issue this Order.

Overall, I am satisfied with my earlier Order. I think it fairly deals with the issues presented and correctly disposes of them. Of course, I am frequently in error and if I fail to recognize and correct that error, as I sometimes do, I am corrected by the Appellate courts. Here, there is perhaps such a situation, but I can only say that, if I am in error, I am firm in that error and respectfully suggest that the remedy is an appeal. I do not say this cavalierly because I am not unaware of the cost of an appeal, and of my duty to correctly decide cases so that no appeal is necessary.

The first five pages of the Plaintiff's Memorandum, attached hereto, address what the Plaintiff's attorney characterizes as "Procedural Concerns with Issuance of Order." The thrust of the argument is that I have not learned the lesson I thought I had been taught by the Supreme Court in *Burgess v. Stern*, ___ SC ___, 428 SE2d 880 (S.C. 1993). I am taken to task for allowing one of the attorneys to draw an order. Here I studied the briefs and whatever else was submitted; I reached the conclusion to which I still adhere, based upon the brief that was submitted by the Defendant's attorney. I draw most of my own Orders and do as many as I can, but I have no law clerk and when I rule in a complicated case, as I consider this to be, with an attorney who is competent to draw an order, I must let him do so, or I could never handle my workload; and it does not seem to me to be objectionable when that attorney turns the Memorandum which he has

submitted to me into his Order, because it is that Memorandum which caused me to rule in his favor. Here, I wrote a letter to the Defendant's attorney instructing him to prepare an order in his client's favor[1]; I sent a copy of that letter to the Plaintiff's attorney. I told the Defendant's attorney to send a copy of the proposed order to the Plaintiff's attorney when he returned it to me. He did so. The Plaintiff's attorney suggests that at that time he should have had a chance to object to the Order. If that is true, then I would have to go through the argument process again. Litigation must have an end. Here, the Plaintiff has an opportunity to be heard and he is being heard. And he has rights in an Appellate Court. If I'm wrong, hopefully the Appellate Court will again advise me.

There are some things which perhaps should be corrected, although they appear to me to all be things which could have been simply pointed out to the Appellate Court. For example, my Order indicates that the Motion to Amend Answer to Request for Admissions was dated February 21, 1983 whereas counsel correctly points out that it in fact was dated February 21, 1993. I am sorry I did not property [sic] proofread the Order and allowed that error to creep in. My order is amended to change the date to the correct one. It also appears that my Order stated the Planning Commission granted a final development *approval* on April 11, 198 [sic], whereas it should have read that it granted a *permit*. Again, I apologize and

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[1] Perhaps I should have said "giving as the basis for such order the grounds you argued in your memorandum."

Order that my previous Order is amended in this regard. A specific objection is:

> Fourth, there can be no dispute that Long Cove had the plat maps of the Long Cove Planned Unit Development (hereinafter "PUD") recorded in Beaufort County RMC in Plat Book 31 at pages 104 and 105, and in Plat Book 32 at page 80 prior to the first anniversary of the permits issuance, preventing the permit from expiration one year later and thereby vesting Long Cove's rights according to Hilton Head Island code § 16-7-744(2) (1983) as a matter of law. The Order dated September 22, 1993, prepared by defense counsel, does not refer to the recording of the plat maps. Therefore, Long Cove moves the Court, pursuant to Rule 59(e), SCRCP, to reconsider its judgment based on the above facts not reflected in the Order and to amend the Order so as to reflect that the plat maps were recorded within one year after issuance of the final development permit, resulting in vesting of Long Cove's rights in the permit.

The Order is amended in the particular urged, i.e., it is amended to show that the plats were recorded as set forth above. Another specific objection is:

> Fifth, even if Long Cove had not recorded the Commercial Subdivision plat with Beaufort County RMC and the Hilton Head Planning Commission (hereinafter "HHPC"), which it in fact did, Long Cove would have vested rights in Final Development Permit No. 0880 under the DSO, Hilton Head Code § 16-7-744(3) (1983). Long Cove spent substantial amounts on development of the land for which the final development permit was issued. *See* Deposition of

> Ames, PP. 52-57. It is a question of facts as to whether this amount constitutes "an appreciable amount of improvement" sufficient to bring it within the purview of Hilton Head Code § 16-7-744(3) as a matter of law. The Order dated September 22, 1993, prepared by defense counsel, does not reflect the above expenditures incurred by Long Cove in developing the land for which Final Development Permit 0880 was issued. Therefore, Long Cove moves the Court, pursuant to Rule 59(e), SCRCP, to reconsider its judgment based on the above facts not reflected in the Order and to amend the Order so as to reflect that substantial amounts were spent on development of the land.

It is certainly true that some expenditures were made and the Order is amended to state that certain expenditures were made.

The other points raised by the Plaintiffs do not in my opinion require my Order to be amended, but rather, they can all be addressed to the Appellate Court.

AND IT IS SO ORDERED.

/s/ Thomas Kemmerlin, Jr.
Thomas Kemmerlin, Jr.,
Master in Equity and
Special Circuit Judge for
Beaufort Common Pleas

Beaufort, South Carolina
This 29th day of March, 1994

U.S. CONST.
Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE 7. DEVELOPMENT PERMITS

PART A. GENERAL PROVISIONS

Sec. 16-7-711. General.

No development shall be undertaken within the town except in accordance with the procedures established in this article.
(Ord. No. 83-6, 10-3-83)

Sec. 16-7-712. Development exempt from permit.

The following types of development shall be exempt from obtaining a development permit from the town planning commission under the provisions of this chapter:

(1) *Single-family residential structures.* Any single-family residential structure (including a mobile home) on an individual parcel, tract, or lot of record; or, on a lot within a platted subdivision existing prior to the adoption of this chapter or approved under this chapter.

(2) *Accessory uses.* Accessory uses incidental to the enjoyment of a single-family residential structure (e.g., detached garage, swimming pool, pumphouse, etc.).

(3) *Home occupations within.* Home occupations confined within a residential structure.

(4) *Farm structures.* All farm and farm-related structures.

(5) *Structures integral to permitted development.* Any structure or use expressly approved as integral

to a development permitted in accordance with the provisions of this article.

(Ord. No. 83-6, 10-3-83)

Sec. 16-7-713. Development subject to permit.

(a) *Development permit required.* No development unless expressly exempted in section 16-7-712 shall commence without a permit approved and issued by the town planning commission in accordance with the provisions of this article.

(b) *Filing and recording of plats.* No plat of the subdivision of land within the town may be filed with or recorded with the register of mesne conveyances for Beaufort County until such plat shall have been submitted to and approved by the town planning commission under the provisions of this article and a final development permit issued as provided for in this article.

(Ord. No. 83-6, 10-3-83)

Sec. 16-7-714. Reserved.

Sec. 16-7-715. Activities authorized by final development permit.

If the conditions set forth in this article are satisfied, the planning commission shall approve the development plan and direct the director, or his designee, to issue a final development permit. Said permit shall authorize the applicant to:

(1) *Record plat.* Record a subdivision plat, where appropriate.

(2) *Commence improvements and construction of support facilities.* Commence all improvements to

the land and the construction of all support facilities as specified by the permit.

(3) *Commence construction of buildings.* Commence the construction of all buildings and facilities shown by the development plan and specified by the final development permit after the issuance of all other government permits, including building permits.

(Ord. No. 83-6, 10-3-83)

Sec. 16-7-716. Conditions for approval.

The following conditions shall be met prior to the final development plan approval (phased planned developments shall be treated by the planning commission, insofar as this section is concerned, by phases, notwithstanding general approval of the entire plan):

(1) *Compliance with procedures.* The applicant has complied with the procedures of this article and has furnished all information, other permits, and data expressly required by this article.

(2) *Development plan compliance.* The development plan complies, as a whole or in the case of phased planned developments, in relevant part with the provisions of this Code.

(3) *Capacity and intent to complete development.* The applicant has satisfactorily demonstrated his capacity and intent to complete the proposed development and to meet all obligations agreed to or incurred as a result of conformance with this chapter within a reasonable time period and in accordance with all conditions of the permit.

(4) *Legal safeguards established.* The applicant has established adequate legal safeguards to ensure

compliance with the approved development plan, and to provide for adequate management of the development regardless of future ownership or control of the land or facilities thereon.

(5) *Legal guarantees supplied.* The applicant has given legal guarantee (where applicable) of the installation and maintenance of water systems, sewer systems, drainage systems, street systems, and open space areas and any other improvements indicated on the final plat in lieu of actual construction of improvements prior to final approval. Such guarantees are applicable only to developments involving the sale or other transfer of lots, building sites or buildings. Guarantees may be in the form of any of the following:

a. Letter of commitment from a public agency providing service (such as a municipality or public service district providing the water or sewer system).

b. Dedication to and acceptance by the state, town or county of permanent public maintenance of streets and/or drainage systems or open space areas.

c. Establishment of an automatic homeowners' association.

d. Performance bond underwritten by an acceptable South Carolina licensed corporate surety.

e. Town government lien against the development property.

f. Escrow account.

g. Irrevocable bank letter of credit.

h. Cashier's check payable to the Town of Hilton Head Island.

i. Any other means acceptable to the town council.

(6) *Demonstration of capacity to fund maintenance of time-sharing units.* For all time-sharing (interval ownership) units, the developer must show, prior to commencement of sales, a financial plan demonstrating its capacity to fund maintenance and other services.

(7) *Other approvals.* Prior to submitting plans for preliminary plan approval on a project containing an element critical to that development involving other agencies including, but not limited to, the South Carolina Coastal Council, Army Corps of Engineers and South Carolina Department of Health and Environmental Control, the applicant shall present evidence of having sought preliminary comments from such agencies regarding: (1) protection of water quality in adjacent waterways and wetlands; (2) the long-term operating viability of any mechanism or process associated with the element.

(Ord. No. 83-6, 10-3-83)

PART B. VARIANCES

Sec. 16-7-721. Variances.

The board of adjustment may approve development not in compliance with the provisions of this chapter, if compliance with these provisions would cause unique

hardship (as provided herein) and if the following conditions are present:

(1) The applicant's request for a variance is submitted in accordance with the provisions of this chapter;

(2) The applicant shall have requested a variance from a standard required in this chapter, and

a. The variance is not a material change from any standard, and

b. The applicant shall either develop the property materially in excess of some other minimum standard or the applicant shall make such other contribution to the town as may be appropriate to compensate for the requested variance.

(3) Is no more than is necessary to overcome the unique hardship; and

(4) Will not significantly interfere with the enjoyment of other land in the vicinity; and

(5) Is not based solely on monetary considerations.

(Ord. No. 83-6, 10-3-83; Ord. No. 83-11, 11-7-83; Ord. No. 85-4, § 4, 3-18-85)

PART C. PERMIT DENIAL

Sec. 16-7-731. Denial of permit.

The planning commission shall deny approval of a development permit only if it finds that the proposed

development does not comply with the expressed provisions of this chapter.

(Ord. No. 83-6, 10-3-83)

PART D. RIGHTS DERIVED FROM PERMITS

Sec. 16-7-741. Rights attaching to preliminary approval.

(1) *Generally.* Approval of the preliminary application by the planning commission shall be deemed an expression that the development concept and preliminary site design submitted are in conformity with this chapter. Preliminary application approval does not authorize the recording of a subdivision plat nor the sale or transfer of subdivided property. Preliminary approval does not either grant or vest in any applicant any right to any variance or deviation from the terms of this chapter. Preliminary approval, in and of itself, does not provide exemption from subsequently enacted amendments to this chapter except as to approvals on use and distribution of population. Approvals as to use and distribution of population shall be deemed vested and therefore exempt from subsequently enacted amendments to this chapter, except in the event that the town council finds in fact that an emergency or other compelling situation exists that presents an imminent danger to the public welfare in which case the council may require modification of the approved use or distribution of population and except as provided in (b) below.

(b) *Planned unit development.* Often a tract of land is masterplanned for development in sections or phases consisting of several different types and distribution of

population of land use. The original developer of a planned unit development may or may not be the developer that actually develops each phase or section to completion. As a special exception to the development permit process, the developer of a planned unit development may sell or transfer ownership of development tracts within a planned unit development in accordance with the following procedures and provisions:

(1) The developer must submit a preliminary application according to the procedures and requirements of this Code and obtain planning and commission approval of the preliminary master plan of the total planned unit development.

(2) Property covenants and restrictions must accompany the transfer of any development tract within the approved planned unit development restricting the new owner to the development type and distribution of population indicated in the approved master plan.

(3) The developer must submit a sworn affidavit from the prospective purchaser of a development tract wherein the purchaser waives his right to the guarantee of the installation of required improvements afforded through this chapter for the subdivision of land, and further states that he understands that a final application must be submitted, and a development permit awarded by the planning commission, prior to commencement of any development on the tract according to the procedures of this Code.

(4) The developer must submit a plat for certification by the planning director or his designee, and subsequently record such plat prior to the

sale or transfer of any development tract or phase.

(5) This procedure shall not be permitted for the sale or transfer of any individual single-family lot or group of lots intended for construction of one single family dwelling.

(Ord. No. 83-6, 10-3-83)

Sec. 16-7-742. Rights attaching to final development permits.

(a) *Effect of changes on pending applications.* Changes to this chapter which become effective after an application for a final development permit has been filed, but before the permit has been granted, apply to the pending application unless it is determined that the ordinance change would place a unique hardship on the applicant in having to modify the application to conform with the change.

(b) *Effect of changes on permitted development.* A change in this chapter which becomes effective after a final development permit has been granted shall not apply to the permitted development unless such permit shall have expired.

(c) *Assignment of permit.* A final development permit is assignable but an assignment does not discharge any assignor from any obligation owed to the local government in connection with the development, unless the town council consents to the discharge of obligation.

(Ord. No. 83-6, 10-3-83)

Sec. 16-7-743. Expiration of preliminary development approval.

Any preliminary approval granted under the provisions of this chapter shall become invalid one year from the date of its issue unless the applicant shall file a properly completed application for a final development permit.

(Ord. No. 83-6, 10-3-83; Ord. No. 85-8, § 1, 5-6-85)

Sec. 16-7-744. Expiration of final development permit.

Any final permit approved under the provisions of this chapter shall become invalid one calendar year from the date of its issue unless:

(1) A building permit is issued and construction is commenced within the life of the building permit, or

(2) The subdivision plat or PUD master plan has been recorded, or

(3) An appreciable amount of improvement or development of the land has commenced in accordance with the approved permit, which in the case of phases developments shall be understood as improvement or development of the permitted phase of such development.

(Ord. No. 83-6, 10-3-83; Ord. No. 85-8, § 2, 5-6-85)

Sec. 16-7-745. Reserved.

ARTICLE IV: ZONING DISTRICTS

PART A – GENERAL PROVISIONS

Section 16-7-400. Authority and Purpose.

This Article IV of the Land Management Ordinance is hereby adopted pursuant to authority granted in Chapter 7 of Title 6 and Section 5-23-685 of the South Carolina Code of Laws (1976), as amended, and in accordance with the 1985 Comprehensive Plan for the Town of Hilton Head Island, as amended. The purpose of this article is to provide for the establishment within the Town of certain base and overlay districts for the purpose of guiding development within the Town in accordance with existing and future needs and in order to protect, promote and improve the public health, safety, morals, convenience, order, appearance, prosperity and general welfare.

Section 16-7-402. Official Zoning Map.

Consistent with Section 16-7-415 herein, there is hereby established for the Town a zoning map which shall be known and designated as "the Official Zoning Map for the Town of Hilton Head Island". This Official Zoning Map is hereby incorporated by reference and made a part of this chapter. Similar versions of this Official Map at a smaller scale shall be available for sale to the public. A copy of the official zoning map shall at all times remain on file in Town Hall and shall be made available for public inspection during regular business hours.

Section 16-7-403. Applicability of Zoning Districts; Effect of Overlay Zoning Districts.

All lands existing within the Town are situated within a base zoning district as shown on the Official Zoning Map, or as may be described elsewhere in this chapter, and any existing or proposed development on such land shall be subject to applicable provisions of this chapter. In addition, certain lands may be situated within one or more of the overlay zoning districts as shown on the Official Zoning Map, or as may be more fully described elsewhere in this chapter, and existing or proposed development so situated shall be subject to applicable provisions of this chapter. Where a certain property may be so situated that it lies within both a base zoning district and one or more overlay zoning districts, the regulations and standards of both the base and overlay zoning district(s) shall be applicable to the development and usage of such property. Where specific regulations or standards regarding a property so situated may conflict, the more restrictive regulation or standard shall be applicable.

PART B – ZONING DISTRICTS.

Section 16-7-415. Establishment and Designation of Zoning Districts.

The Town of Hilton Head Island is hereby divided into zoning districts. The following is a list of such zoning districts, together with appropriate abbreviations as may

appear on the Official Zoning Map and elsewhere within this chapter:

CON	Conservation/Park/Open Space Zoning District
R-2	Residential Detached Single Family Zoning District
R-3	Residential Detached Single Family Zoning District
R-4	Residential Detached Single Family Zoning District
R-5	Residential Detached Single Family Zoning District
R-8	Residential Moderate Density Zoning District
M-1	Planned Development Mixed Use Zoning District
M-2	Community Mixed Use Zoning District
M-3	Water-Oriented Mixed Use Zoning District
RD-1	Central Forest Beach Zoning District
RD-2	Resort Development Zoning District
C-1	Neighborhood Commercial Zoning District
C-2	Parkway Light Commercial Zoning District
C-3	Office/Institutional Low Intensity Zoning District
C-4	Office/Institutional Moderate Intensity Zoning District
C-5	Commercial Center Zoning District
C-6	Regional Commercial Zoning District
C-7	Heavy Commercial Zoning District

AHZ	Airport Hazard Overlay Zoning District
RC	Road Corridor Overlay Zoning District
WC	Waterfront Corridor Overlay Zoning District
AH	Affordable Housing Overlay Zoning District

* * *

Section 16-7-435. M-1 Planned Development Mixed Use Zoning District

(a) Character and Purpose:

The purpose for establishing this M-1 zoning district is to recognize the existence within the Town of certain unique planned developments which are mixed use areas of greater than 250 acres in size. Generally, these areas have served to establish the special character of Hilton Head Island as a high-quality resort and residential community and it is the intent in establishing this zoning district to allow the continuation of well-planned development within these areas. In limited situations, the zoning map places some commercially planned portions of those planned developments in other base districts to more specifically define the types of commercial uses allowed.

(b) Permitted Uses and Maximum Area Densities:

The following planned development areas included in the M-1 zone have received town approval prior to adoption of this chapter as to general permitted uses and maximum area densities and the area maps (the "masterplans") as so approved are hereby incorporated by reference

as a part of the official Town zoning map, except as may be modified by specific use zones:

Sea Pines Plantation
Wexford Plantation
Long Cove Club
Shipyard Plantation
Palmetto Dunes Resort (including Shelter Cove)
Spanish Wells Plantation
Port Royal Plantation (and surrounds)
Hilton Head Plantation
Palmetto Headlands
Indigo Run Plantation

Amendments to these master plans shall be subject to all the requirements of any rezoning request.

(c) Special Site Regulations:

(1) Setback requirements contained within Article VIII of this chapter shall apply to the perimeter of these districts.

(2) Maximum structure height 75 feet above pre-development grade, not to exceed five (5) stories.

(3) Maximum impervious coverage shall not be greater than 45% for the entire district.

(4) Minimum open space shall not be less than 55% of the entire district.

* * *

Section 16-7-452. C-3 Office/Institutional Low Intensity Zoning District

(a) Character and Purpose:

This district is established in between the major commercial nodes of the Island to limit the types of non-residential uses permitted. Land uses permitted are office and institutional in order to minimize travel impacts on the street system, encourage better compatibility in and among land uses on the Island, provide balance among land use types in major corridors and improve visual appearance along major corridors. C-3 is the lower intensity Office/Institutional district providing for smaller scale buildings and sites.

(b) Permitted Uses:

(1) By right:

Medical Offices and Clinics
Funeral Homes
Utility Offices
Law Offices
Real Estate and Land Development Offices
Professional and Administrative Offices
Churches
Schools
Restaurants
Agricultural

(2) Subject to special exception review criteria:

Fast food establishments
Parking lots and garages (as primary use)
Other office or institutional uses not listed in (b)(1) above

(3) Subject to conditional use review criteria:

Planned unit development, including residential uses

(c) Maximum Site Densities:

(1) Residential: 4 dwelling units per net acre
(2) Non-Residential: 12,000 square feet per net acre

(d) Special Site Regulations:

(1) Maximum structure height: 35 feet above pre-development grade, not to exceed two (2) stories
(2) Maximum impervious site coverage:
   a. Residential – 40%
   b. Non-Residential – 60%
(3) Minimum open space required:
   a. Residential – 50%
   b. Non-Residential – 25%

THE OFFICIAL ZONING MAP FOR THE TOWN OF HILTON HEAD ISLAND, REFERENCED IN § 16-7-402, REFLECTS THAT REMAINING LAND OF LONG COVE CLUB IS IN AREA ZONED AS C-3.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH
COUNTY OF BEAUFORT	)	JUDICIAL CIRCUIT
Long Cove Club Associates, L.P., A South Carolina Limited Partnership Consisting of Long Cove Club Investors, Inc., David W. Ames, Joseph A. Webster, III, Weston C. Wilhelm, Ames Family Trust I, Webster Family Trust I, Wilhelm Family Trust I, Marthelm, Inc., Webco, Inc. and Amesco, Inc.,	)	Docket No. 87-CP-07-1648
Plaintiff,	)	
v.	)	
The Town of Hilton Head Island, The Town of Hilton Head Island Town Council, Mayor Mike J. Malanick, Bruce C. Black, Henry Driessen, Jr., Suzanne M. James, Donald S. Hook, William Marscher, II and W. Bruce Fairchild, individually and in their capacity as elected members of the Hilton Head Island Town Council,	)	AMENDED COMPLAINT
Defendants.	)	

The Plaintiff would respectfully show that:

PARTIES

1. The Plaintiff, Long Cove Club Associates, L.P. (hereinafter referred to as "Plaintiffs" or "Long Cove") is a limited partnership organized and existing under the laws of the State of South Carolina, transacts business, and owns property in the County of Beaufort, South Carolina.

2. The Defendant, The Town of Hilton Head Island, (hereinafter referred to as the "Town") is a municipal corporation allegedly organized under and created pursuant to the laws of the State of South Carolina, and as such is required to observe all applicable state and federal laws and constitutional provisions.

3. The Defendant, The Town of Hilton Head Island Town Council (hereinafter referred to as the "Council") is the municipal governing body of the Defendant Town and is allegedly organized under the laws of the State of South Carolina and The Town of Hilton Head Island; and that at all times mentioned herein, the Defendant Council acted or attempted to act under alleged authority vested in it by the Defendant Town and the State of South Carolina and acted on behalf of the Defendant Town.

4. The Defendants, Malanick, Black, Driessen, James, Hook, Marscher and Fairchild are, on information and belief, citizens and residents of the County of Beaufort, State of South Carolina, and are duly elected members of the Defendant Council and are individually

named and further joined as parties to this action as members of the Defendant Council.

5. The Defendants individually named in Paragraph 4 at all times mentioned herein were charged with certain duties, responsibilities and obligations pursuant to the laws of the State of South Carolina and the Ordinances of the Town of Hilton Head Island, and, in addition thereto, were required to observe all applicable laws, regulations and statutes which affect the matters set forth herein and to act reasonably at all times in carrying out their civic responsibilities.

JURISDICTION

6. This Complaint contains a cause of action based upon 42 U.S.C. §1983 which cause of action can be prosecuted in this Court.

7. This Complaint contains a cause of action for an unconstitutional taking both under the South Carolina Constitution and the Constitution of the United States.

8. The Complaint contains a cause of action for a denial of due process and equal protection under the South Carolina Constitution.

9. This action contains a cause of action for negligent, reckless, and wanton behavior by the Defendants.

10. This Court has jurisdiction of all of the above causes of action due to its plenary jurisdictional power under the South Carolina Constitution, Article 5 § 7.

FACTS

11. The Plaintiff owns certain real property located on Hilton Head Island, Beaufort County, South Carolina which is more particularly known as Long Cove Commercial Subdivision (hereinafter referred to as the "Property") which is situated within the Long Cove Club Planned Unit Development on Hilton Head Island which is more particularly known as Long Cove Club Plantation.

12. The Property consists of 40.942 acres and is situated along U.S. Highway 278 which is the major and central road of Hilton Head Island, with the Property having approximately 1700.60 feet of frontage along U.S. Highway 278.

13. The Plaintiff is the owner, developer, operator and manager for the planned unit development known as Long Cove Club Plantation.

14. The development and improvement of Long Cove Club Plantation is guided, patterned and controlled by that certain Master Plan for Long Cove Club (hereinafter referred to as the "Master Plan") which was approved before the incorporation of the Town by the Beaufort County Joint Planning Commission on May 5, 1980 pursuant to the Beaufort County Development Standards Ordinance; and also approved by the Town of Hilton Head Island Planning Commission on October 19, 1983, pursuant to the Hilton Head Island Development Standards Ordinance, which Master Plan and said approvals are more particularly incorporated in this Complaint by reference thereto as if more particularly contained herein.

15. Based on the Master Plan, Plaintiff, since 1980 to date, has actively undertaken the development, operation and control of this planned unit development in an integrated fashion and has expended significant sums of money in the development and operation of Long Cove Club including the Property.

16. The Property has been designated on the Master Plan since 1980 to contain commercial, retail, office and other land uses as is more particularly shown on the Master Plan and exhibits thereto. In addition, portions of the Property have been restricted for commercial uses by various covenants, conditions, and restrictions recorded in the R.M.C. Office for Beaufort County, South Carolina.

17. Prior to April 1984, Long Cove began undertaking the land planning and landscape design for the commercial development of the Property; and that such land planning and landscape design for the Property was undertaken in conformity with the Master Plan and the Development Standards Ordinance of the Town of Hilton Head Island (hereinafter referred to as the "DSO") and all other provisions of the Ordinances of The Town of Hilton Head Island.

18. Plaintiff received a Final Development Permit from the Town for the Property on April 11, 1984.

19. Plaintiff has sold various parcels of the Long Cove Commercial Subdivision and currently owns a 9.78 acre tract which is the final parcel to be developed.

20. Section 16-7-742 of the DSO stated that Final Development Permits were not subject to subsequent

changes in the DSO and granted Plaintiff vested rights as to use and density.

21. On December 16, 1985, the Town Council adopted that certain Comprehensive Land Plan for the Town of Hilton Head Island, South Carolina Article VIII-5 of the Comprehensive Plan specifically identified Long Cove as an approved, Planned Unit Development and stated that the Town was not to disturb the intended land use systems and related covenants as currently planned. At that time, the Plaintiffs had received vested rights in the Property pursuant to its approved Master Plan and Final Development Permit. Article VIII-11 of the Comprehensive Plan requires the Town to "pay extraordinary attention to the projects now holding preliminary Master Plan Approvals. Article IX-5 of the Comprehensive Plan sets forth the vested rights policy of the Town and specifically provides that "the Town will not disturb the final approvals given under the terms of the current DSO for the life of the approval." At that time, the Plaintiffs had developed or sold significant portions of the Property pursuant to its approved Master Plan and the Final Development Permit issued April 11, 1984. Said Comprehensive Plan is hereby incorporated into this Complaint as if fully restated verbatim.

22. On or about December 12, 1987, the Town issued a "Proposed Policy Statement to be added to the Comprehensive Plan regarding the Preservation of Hilton Head Island's Character" which was scheduled for public hearing on December 30, 1986, which allegedly attempted to amend certain portions of the Comprehensive Plan dated

November 25, 1985. Said policy statement in part attempted to further restrict the rights of property owners, including Plaintiff and those similarly situated, to develop their property. The proposed amendments which the Town claimed apply to Plaintiff included the following concepts:

(a) Restricting commercial development outside "the major commercial nodes" (major commercial nodes not being defined in said proposed amendment);

(b) Prohibiting resort commercial uses on Plaintiff's Property;

(c) Attempting to limit commercial development to areas close to the bridge and close to the confluence of Highway 278 and the proposed Cross Island Expressway;

(d) Restricting moderately heavy commercial areas to those areas *presently evolving* in that manner. (Emphasis added); and

(e) Attempting to limit vested rights in property to rate of growth limitations enacted by subsequent ordinances.

23. Upon information and belief the aforesaid Amendments to the Comprehensive Plan were thereafter adopted by the Town.

24. The intent of the alleged Amendments on commercial development was an attempt to authorize further restriction of such development; however, the Plaintiff's vested rights remained unchanged as a result thereof. The only growth limitation ordinances which have been adopted by the Town pertain to restrictions on residential and hotel development. No growth limitation ordinances

have been adopted to restrict commercial development or which affect Plaintiff's vested rights on the Final Development Permit for the Property.

25. On December 10, 1986, an advertisement was placed in the *Island Packet* announcing the scheduling of a public hearing to be held by the Defendant Planning Commission on January 8, 1987, in order to receive public comment concerning the adoption of the of a Land Management Ordinance by the Defendant Town (hereinafter referred to as the "LMO").

26. Such public hearing was held on January 8, 1987 by the Town Planning Commission, and the LMO was given first reading by the Town Council on January 12, 1987, and the LMO was given second reading and was adopted by the Town Council on January 19, 1987. The LMO allegedly replaces the DSO.

27. Section 16-7-352 of the LMO states that Final Development Permits previously issued are recognized in the LMO, are not subject to subsequent changes in the LMO, and consequently recognized Plaintiff's vested rights as to use and density in the Property.

28. The provisions of LMO Section 16-7-452(b) restrict the establishment of commercial land uses within the Property to the following land uses: medical offices and clinics, funeral homes, utility offices, law offices, real estate and land development offices, professional and administrative offices, churches, schools, restaurants and agricultural uses.

29. The above-referenced land use restrictions contained within LMO Section 16-7-452(b) are those land use

control restrictions assigned to what is identified as the C-3 Office Institutional Low Intensity Zone of the LMO.

30. Under the Zoning Map adopted in conformity with the LMO, the Property has been allegedly placed in a C-3 zoning classification.

31. The C-3 zoning restrictions do not permit and allow the establishment of the commercial retail and wholesale uses as allowed to the Plaintiff by the Master Plan and Final Development Permit issued to the Plaintiff.

32. While the Property has been placed in the C-3 zone, the remainder of Long Cove Club Plantation Planned Unit Development has been placed in the M-1 zoning classification.

33. The M-1 Planned Development Mixed Use Zoning District as set forth in LMO Section 16-7-435 allows and permits the development of land uses as shown on the Master Plan, and the Master Plan contains, permits and allows the establishment of commercial, retail and wholesale uses within its boundaries.

34. Prior to the adoption of the LMO, Plaintiff officially protested to the appropriate Town agencies and officers the C-3 classification of the Property, and the Plaintiff additionally protested the segregation of the Property by placing it in the C-3 zoning classification while the remainder of Long Cove Club Plantation Planned Unit Development was placed in the M-1 zoning classification.

35. On March 17, 1987 Plaintiff, while reserving and not waiving its vested rights, filed an application with the

Town for an Amendment to the official town zoning map seeking to have the Property properly rezoned to an M-1 designation. Said rezoning application was filed to exhaust Plaintiff's administrative remedies.

36. After Plaintiff consented to various conditions on its rezoning application suggested and imposed by the Town planning staff, the proposed rezoning application with the compromise conditions was presented to the Town Planning Commission in accordance with §16-7-626 of the LMO. The Planning Commission recommended approving the rezoning with conditions to the Town Council.

37. On July 6, 1987, after deliberating in a secret and closed executive session of the Town Council, purportedly to receive legal advice from the Town attorney, without Plaintiff's participation, without any discussion and without allowing any testimony or presentation by Plaintiff, but with apparent secret comments, discussion, materials and recommendations from the Town manager and director of planning (neither being members of the Town Council), the Town Council denied the Plaintiff's rezoning request.

38. The Plaintiff thereafter received an unsigned "proposed ordinance" stamped denied which purports to give notice of the action of the Town Council to Plaintiff. Plaintiff believes that "the proposed ordinance" was considered by the Town Council in its secret deliberations. Plaintiff was never notified or delivered a copy of the proposed ordinance purportedly providing for the rezoning request until after the action of the Town Council. Neither was the Plaintiff given a copy of the written

materials given to Town Council by the Town planning staff or others in connection with their review of Plaintiff's rezoning request.

39. Prior to the date of the above-referenced hearing the Defendant Town Council on July 6, 1987, the Plaintiff had spent at least One Hundred Fifty Thousand and 00/100 ($150,000.00) Dollars on engineering, land planning, surveying services, development, marketing, legal, utility and construction costs on the Long Cove commercial tract. Additionally, Plaintiff has paid substantial real estate brokerage commissions related to the Property.

40. Prior to the Property being allegedly zoned C-3 by the LMO, the remaining 9.78 acre parcel in the Property had a fair market value, upon information and belief, of Two Million and 00/100 ($2,000,000.00) Dollars. After the 9.78 acre parcel was zoned C-3, the parcel had, upon information and belief, a fair market value of One Million Two Hundred Seventy-Five Thousand and 00/100 ($1,275,000.00) Dollars.

FOR A FIRST CAUSE OF ACTION

(42 USC 1983)

41. Each and every allegation above is incorporated herein.

42. The Defendants are all persons as defined under 42 USC 1983.

43. The Defendants action have been under color of statutes, ordinances, regulations, customs or usage of this State.

44. The actions of the Defendants have deprived Plaintiff of a right, privilege or immunity secured by the Constitution and/or laws of the United States *inter alia* as follows:

(a) They failed to honor the vested rights of Plaintiff created by virtue of the approved Master Plan and the Final Development Permit and the good faith expenditure of significant sums by the Plaintiff based upon same;

(b) They failed to recognize that DSO §16-7-742 and LMO §16-7-352 specifically prohibited the application of the C-3 zoning classification to the Property;

(c) They failed to observe the Ordinances of the Town of Hilton Head Island as they existed at the time of the enactment of the LMO including the establishment of the C-3 zoning classification on the Property;

(d) They failed to clearly recognize the vested rights of the Plaintiff to establish commercial retail and wholesale land uses within the Property as set forth in the rezoning application based upon the significant good faith reliance made by the Plaintiff;

(e) They failed to honor the vested rights of the Plaintiff to establish commercial retail and wholesale land uses within the Property based upon the continuing governmental approval of the Master Plan and the significant sums expended by the Plaintiff in undertaking the development, management and operation of the Property as part of the Long Cove Club Plantation;

(f) They allegedly caused the retroactive application of the LMO impairing extant property contract rights in violation of the South Carolina and the *Ex Post Facto* and other provisions of the United States Constitution;

(g) They denied Plaintiff's right of due process by deliberating the merits of Plaintiff's application in a secret closed session of the Town Council without notice to Plaintiff or granting Plaintiff the right to present its case for the rezoning application, all in violation of the federal and state constitutions and *S.C. Code Ann.* §30-3-10 et. seq. (1976 as amended).

(h) They violated the vested rights section of the Comprehensive Plan for the Town of Hilton Head Island and the LMO.

(i) They engaged in the spot zoning of the Property through the segregation of this tract from the remainder of Long Cove Club Plantation and from the surrounding tracts;

(j) They failed to follow the proper procedures as set forth in the laws of South Caroloina [sic] for the establishment of zoning ordinances and zoning maps.

45. As a direct and proximate cause of the actions of Defendants, Plaintiff has been damaged in an amount in excess of $700,000. Plaintiff is therefore entitled to actual damags [sic] in excess of $700,000 plus punitive damages against the Defendants both jointly and severally.

FOR A SECOND CAUSE OF ACTION

(Unconstitutional Taking of Permit)

46. Each and every allegation above is incorporated herein.

47. The Defendants by their actions set out above has taken property of the Plaintiff in violation of the South Carolina Constitution and the Constitution of the United States.

48. As a result of the unconstitutional taking the Plaintiff has been injured in excess of $700,000.

49. Plaintiff is entitled to actual damages in excess of $700,000 against the Defendants.

FOR A THIRD CAUSE OF ACTION

(South Carolina Constitutional Tort)

50. Each and every allegation above is incorporated herein.

51. The actions of Defendant as set forth above and as partially set forth in Paragraph 44 deprived Plaintiffs of its rights under Article I, Section 3 of the South Carolina Constitution.

52. As a direct and proximate result of Defendants' unconstitutional actions Plaintiff has been injured in excess of $700,000.

53. Plaintiff is therefore entitled to actual damages in excess of $700,000 plus punitive damages against the Defendants jointly and severally.

FOR A FOURTH CAUSE OF ACTION

(Negligence)

54. Each and every allegation above is incorporated herein.

55. The Defendants had a specific legal duty to know, comprehend, and understand the terms of the DSO, the Comprehensive Land Plan for the Town of Hilton Head Island, and the LMO.

56. The Defendants had a further duty regarding "vested rights" issues in the drafting, promulgating and passing the LMO and were charged with the duty not to violate any terms of the DSO or any policy considerations set forth in the Comprehensive Land Plan for the Town of Hilton Head Island which specifically preserved the vested rights of landowners from changes in subsequent ordinances including the LMO.

57. The Defendants were negligent, grossly negligent, reckless, willful and wanton in the following particulars:

(a) In failing to insure that the vested rights Sections in the DSO and the Comprehensive Land Plan for the Town of Hilton Head Island were accurately and adequately reflected in the official zoning map drafted and passed as a part and parcel of the LMO;

(b) In failing to adequately protect and account for the vested rights of the Plaintiffs in the Property at the time the Town established the C-3 zoning designation for the subject property;

(c) In failing to rectify and properly rezone the Property to an M-1 zoning district upon being notified by the Plaintiff of its vested rights and further in denying the rezoning application property filed by the Plaintiff.

58. As a direct and proximate result of the Defendants' negligence, gross negligence, recklessness, willfulness and wantonness the Plaintiff has incurred actual damages in excess of $700,000.

59. Plaintiff is therefore entitled to actual damages in excess of $700,000 plus punitive damages for the Defendants jointly and severally.

FOR A FIFTH CAUSE OF ACTION

(Declaratory Action)

60. Each and every allegation above is incorporated herein.

61. The Plaintiff has a "vested right" in the final development permit which the Defendants have purposefully disregarded.

62. The Plaintiff asks the Court to declare the permit valid and usable.

WHEREFORE, the Plaintiff asks that it be given judgment against the Defendants jointly and severally as follows:

1. On all causes of action at lease [sic] $700,000 actual damages;

2. On cause of action one, three and four punitive damages as the Court or jury shall find.

3. On cause of action five, declare the permit valid.

4. On all causes of action reasonable expenses and attorney fees.

5. On all causes of action costs and such other relief as the Court shall deem proper.

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ATTORNEYS FOR THE
PLAINTIFF

Columbia, South Carolina
Nov. 2, 1987